

Before the  
**Federal Communications Commission**  
Washington, D.C. 20554

RECEIVED  
MAR 11 1998  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
Amendment of Section 73.202(b), )  
Table of Allotments, )  
FM Broadcast Stations )  
(Lewisville, Gainesville, Robinson, )  
Corsicana, Jacksboro, and )  
Mineral Wells, Texas) )

MM Docket No. 97-91  
RM-8854

To: Chief, Allocations Branch

**DOCKET FILE COPY ORIGINAL**

**JOINT OPPOSITION TO MOTION TO DISMISS OR TO STRIKE**  
**JOINT REPLY COMMENTS AND REPLY COMMENTS**

Heftel Broadcasting Corporation ("Heftel") and Jerry Snyder and Associates, Inc. ("Snyder") (both the "Joint Commentors") hereby respectfully submit their Joint Opposition to the Motion to Dismiss or to Strike Joint Reply Comments and Reply Comments (the "Motion"), filed by Metro Broadcasters-Texas, Inc. ("Metro") on February 24, 1998.<sup>1</sup> In opposition<sup>2</sup> thereto, it is stated as follows:

I. **The Motion Must Be Rejected as an Unauthorized Pleading.**

At p.1, fn. 1 of the Motion Metro states: "To the extent it is necessary, Metro hereby requests leave to file this motion." Thus, Metro tacitly admits that the Motion is an unauthorized pleading. While such a motion may be permissible in an adjudicatory

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<sup>1</sup> Thus, pursuant to Sections 1.45(a) and 1.4(h) of the Commission's Rules, an opposition to the Motion is due no later than March 11, 1998.

<sup>2</sup> Heftel is, concurrently with the filing of this Joint Opposition, also filing a separate partial opposition to Metro's Motion.

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proceeding pursuant to Section 554 of the *Administrative Procedure Act* (“A.P.A.”), Section 553 (Rule making) provides only for comments and reply comments. Section 1.415(d) of the FCC’s rules provides: “No additional comments may be filed unless specifically requested or authorized by the Commission.”

Metro did not set forth good cause (or, indeed, any cause) for filing the Motion, and the Commission did not request such a filing on its own. Indeed, most of the Motion is repetitive of the arguments Metro made in its Reply Comments filed May 20, 1997, and its further Reply Comments filed February 12, 1998.

In the Motion at p.3, Metro cites *Berlin, DeForest, Markenson and Wautomona, Wisconsin*, 10 FCC Rcd 7733 (Chief, Allocations Branch, 1995) (“*Berlin*”) for the proposition that “The Commission refused to consider a counterproposal that was short-spaced....” However, *Berlin* also supports the proposition that the Motion must be summarily rejected as an unauthorized pleading. In *Berlin* at 7733 the FCC noted that “Late-filed Comments were received from petitioner, MBC and Murphy.<sup>3/</sup>” At fn. 3 of *Berlin*, the FCC held:

The Commission’s Rules do not contemplate the filing of pleadings beyond the comment and reply comment period. Therefore, in accordance with Section 1.415(d) of the Commission’s Rules, we shall not accept the unauthorized pleadings.

Reply Comments in this proceeding were due to be filed by February 12, 1998. Metro filed Reply Comments on that date. The Motion is nothing more than a blatant attempt to file an untimely supplement to Metro’s Reply Comments. Because the FCC’s rules do not contemplate the filing of a reply to a reply in a rulemaking proceeding, the Motion is really an unauthorized reply to the Joint Commentors’ authorized reply. For

the FCC to establish the precedent that such an unauthorized pleading would even be considered would undermine the very purpose of Section 1.420 of the Commission's rules which is designed to limit pleadings to comments and reply comments in order to expedite the institution of new service. Indeed, Metro's Motion forces the Joint Commentors to file the instant opposition [to which Opposition Metro will probably file a further reply.] It is to prevent delay in the rulemaking process that Section 1.415(d) of the Commission's rules was adopted. In order to avoid the future filing of such unauthorized pleadings by other parties in rule making proceedings, Section 1.415(d) should be strictly enforced by the dismissal of Metro's Motion.

II. **There Is No Basis Either in Law Or in Fact to Support Metro's Motion.**

a. **The Motion Is Based on a False Premise.**

Metro's Motion is predicated on the false premise that Snyder's application (BPH-961125IG) is being considered by the Commission as an application, rather than as a counterproposal in this rule making proceeding. Were that so, the Joint Commentors would have had no reason to explore ways in which both the Heftel rulemaking proposal and Snyder's request for a Class C1 allotment to Mineral Wells could be accommodated. However, on January 28, 1998, the FCC issued a public notice (Report No. 2251) in which it classified Snyder's application as a rulemaking counterproposal and authorized the filing of reply comments.<sup>3</sup>

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<sup>3</sup> As such, the FCC's staff was operating under delegated authority with the full power of the Commission, *Anax Broadcasting, Inc.*, 87 FCC 2d 483 (1981).

As a result Heftel and Snyder found themselves in an either/or situation unless some way could be found to resolve the conflict. In this situation, either Heftel's proposal could be approved thereby depriving Mineral Wells of a Class C1 allotment - which the FCC had already found to be in the public interest,<sup>4</sup> - or Mineral Wells could retain its Class C1 allotment, thereby depriving Lewisville, Texas, of its first local service. The Joint Commentors' solution to resolve this conflict was to change the reference point for the Mineral Wells allotment. Both parties recognized years of delay could come about through judicial and administrative review of this matter.<sup>5</sup> However, because this compromise required Snyder to abandon prosecution of its application as presently filed and to go through the expense of finding a new and somewhat less desirable site, the parties entered into the compensation agreement as discussed in the Joint Reply Comments filed by the Joint Commentors.

b. **The Motion is Largely Repetitive.**

Section II of the Motion is repetitive of the argument set forth in Section I of Metro's Reply Comments filed on May 20, 1997, in this proceeding and reiterated in Metro's Reply Comments filed February 12, 1998. As such, there is simply no justification for Metro's making the same argument in the Motion and for this reason alone the Motion should be rejected.<sup>6</sup>

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<sup>4</sup>See, *FM Table of Allotments - Mineral Wells, Texas*, 7 FCC Rcd 1791 (Chief, Allocations Branch, 1992) (*The Mineral Wells Allotment*).

<sup>5</sup> For example, in *Reeder v. FCC*, 865 F.2d 1298 (D.C. Cir., 1989), the Court of Appeals remanded an FCC proceeding begun six years earlier requiring further delay in the institution of new service to several communities.

<sup>6</sup> Obviously, if the Commission had rejected Heftel's proposal based on Metro's first expousal of this argument in Metro's Comments and Reply Comments, then the FCC

c. **Metro's Argument that the Joint Reply Comments Are in Violation of Section 1.420(j) Is Fallacious.**

In the Motion, Metro argues that the proposal to change the Mineral Wells reference point means that Snyder will serve less population than Snyder would from the original Mineral Wells reference point, and thus Snyder is withdrawing its expression of interest. That factual assertion is fallacious for two reasons.

First, as a Class C3 operation, Snyder, as licensee of Station KXYS, is serving only 51,276 persons within its 60 dBu contour (See Att. A). In the Motion Metro submits an engineering showing using the reference point proposed in the Joint Reply Comments as the actual transmitter site. From this site Snyder would serve 164,230 persons or 112,854 persons more than it is presently serving as a Class C3 station. In its counterproposal to the Heftel proposal, filed May 5, 1997, at p.5 Metro proposed to provide additional service as a C2 operation, rather than its present C3 status, to 137,974 persons within its 1 mV/m contour, but this requires that the Heftel proposal be rejected. Metro fails to mention in its Motion that Heftel's proposal would provide additional service to 2,721,385 persons. Grant of both the Heftel proposal and the Snyder proposal, as proposed in the Joint Reply Comments, would provide additional service to 2,859,359 persons - a net gain of 2,721,385 persons over Metro's proposal.

A reference point is merely a tool for allocation purposes. A reference point is not the site the FCC mandates must be the location of the new facility. So long as an applicant shows that it is in compliance with the spacing requirements set forth in Section

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would not have classified Snyder's application as a counterproposal and the whole matter would have been resolved in Snyder's favor. But the FCC did not do this.

73.207 of the Commission's Rules and provides the requisite coverage to the city of license, any available site may be used.

Metro must know that its engineering study is fallacious. The study does not use the reference point for Mineral Wells of North Latitude 32° 41' 06" and West Longitude 98° 09' 32" established in *The Mineral Wells Allotment*. Rather, in its engineering study Metro uses the coordinates of North Latitude 32° 39' 39" and West Longitude 98° 09' 34" which are the coordinates set forth in the pending application filed by Snyder. It is specification of these coordinates that was the basis of the FCC's decision in the Public Notice dated January 28, 1998, to consider Snyder's application as a counterproposal to Heftel's rulemaking petition. It is the modification of the Mineral Wells reference coordinates as proposed in the Joint Reply Comments that provides the solution to the conflict. Moreover, there are many ways in which coverage may be enhanced while spacing requirements are preserved. For example, see, *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Stations by Using Directional Antennas*, 4 FCC Rcd 1681 (1989).

d. **The A.P.A. gives the FCC great flexibility in rulemaking proceedings.**

Metro argues that the Commission's decision in *Pinewood, South Carolina*, 5 FCC Rcd 7609, 7610 ¶11 (1990) is limited to changes in channels, not changes in reference points. That is not the law. As the Court of Appeals for the D.C. Circuit taught us:

[A] final rule may properly differ from a proposed rule - and indeed must so differ - when the record evidence warrants the change. A contrary rule would lead to the absurdity that in rulemaking under the APA the agency

can learn from the comments on its proposal only at the peril of starting a new procedural round of commentary.

*Edison Elec. Inst. v. OSHA*, 849 F.2d 611, 621 (D.C. Cir. 1989)

Moreover, the FCC has broad powers to resolve a rulemaking in a manner so as to institute service and avoid uncertainty and delay. See, *Omnipoint Corporation v. FCC*, 78 F.3rd 620 (D. C. Cir. 1996). (The Commission may even deny the right to file reply comments in order to expedite the institution of new service.)

Finally, Metro makes the absurd argument that Snyder's agreeing to a proposal that the reference point for Mineral Wells be changed is a violation of Section 1.420(j) of the FCC's rules. To the contrary, it is precisely because Snyder wants to prosecute its Class C1 allotment proposal that the compromise between Snyder and Heftel was reached. Snyder is neither withdrawing nor dismissing its expression of interest to upgrade Station KXYS to utilize Channel 240C1 at Mineral Wells, so Section 1.420(j) on its face does not apply. Had Snyder not desired to prosecute its proposal for a Class C1 allotment to Mineral Wells it could have previously agreed to some arrangement with Heftel prior to the period for filing comments and not filed an expression of interest. To the contrary, what is clear from the Joint Reply Comments is that Snyder wants to provide Class C1 service to Mineral Wells as quickly as possible. Thus, in order to do so the only way to resolve the conflict with the Heftel proposal was to change the Mineral Wells reference coordinates. Nothing in Section 1.420(j) of the FCC's rules is relevant to the compromise brought about by the parties which is perfectly consistent with Snyder's expression of interest in upgrading Station KXYS on Channel 240C1 at Mineral Wells.


### III. Conclusion

It is in Metro's private interest to see that its counterproposal to provide Class C2 service to Howe, Texas (pop. 2,173) in order to provide increased service to 137,974 persons is approved, as against approval of the Heftel and Snyder proposals to provide additional service to 2,859,359 persons. In its private interest, Metro has filed an unauthorized pleading which is supported by neither the law nor the facts. As such, Metro's Motion must be summarily rejected.

Respectfully submitted,

**JERRY SNYDER AND ASSOCIATES, INC.**

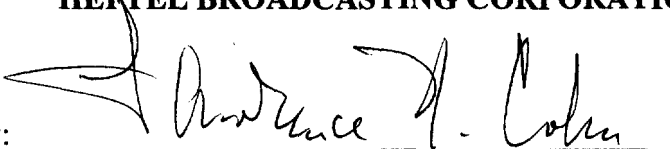
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March 11, 1998  
SNYDER/PN/JTOPP.311



**ATTACHMENT A**



FEDERAL COMMUNICATIONS COMMISSION

FM BROADCAST STATION CONSTRUCTION PERMIT

ATTN: F  
Snyder  
Oct 4  
app.

Official Mailing Address:

JERRY SNYDER AND ASSOCIATES, INC.  
P.O. BOX 638  
MINERAL WELLS, TX 76067

Authorizing Official:

Arthur E. Doak  
Supervisory Engineer, FM Branch  
Audio Services Division  
Mass Media Bureau

Grant Date: SEP 4 1980

Call sign: KYXS-FM

This permit expires 3:00 am.  
local time 18 months after  
grant date specified above

Permit File No.: BPH-900627IE

Subject to the provisions of the Communications Act of 1934, as amended, subsequent acts and treaties, and all regulations heretofore or hereafter made by this Commission, and further subject to the conditions set forth in this permit, the permittee is hereby authorized to construct the radio transmitting apparatus herein described. Installation and adjustment of equipment not specifically set forth herein shall be in accordance with representations contained in the permittee's application for construction permit except for such modifications as are presently permitted, without application, by the Commission's Rules.

This permit shall be automatically forfeited if the station is not ready for operation within the time specified (date of expiration) or within such further time as the Commission may allow, unless completion of the station is prevented by causes not under the control of the permittee. See Sections 73.3598, 73.3599 and 73.3534 of the Commission's Rules.

Equipment and program tests shall be conducted only pursuant to Sections 73.1610 and 73.1620 of the Commission's Rules.

Name of permittee:

JERRY SNYDER AND ASSOCIATES, INC.

Station Location:

TX-MINERAL WELLS

Frequency (MHz): 95.9

Channel: 240

Class: C3

Hours of Operation: Unlimited

Transmitter location (address or description):

300 N.E. 11TH AVENUE, MINERAL WELLS, PALO PINTO COUNTY,  
TEXAS.

Transmitter: Type accepted. See Sections 73.1660, 73.1665 and 73.1670  
of the Commission's Rules.

Transmitter output power: As required to achieve authorized ERP.

Antenna type: (directional or non-directional): Non-directional

Antenna coordinates: North Latitude: 32 48 42.0  
West Longitude: 98 06 11.0

	Horizontally Polarized Antenna	Vertically Polarized Antenna
Effective radiated power in the horizontal plane (kW) . . . . . :	25.0	25.0
Height of radiation center above ground (meters) . . . . . :	53.0	53.0
Height of radiation center above mean sea level (meters) . . . . . :	379.0	379.0
Height of radiation center above average terrain (meters) . . . . . :	87.0	87.0
Overall height of antenna structure above ground (including obstruction lighting, if any) . . . . . :	61.0 meters	

Obstruction marking and lighting specifications for antenna  
structure:

It is to be expressly understood that the issuance of these specifications  
is in no way to be considered as precluding additional or modified marking  
or lighting as may hereafter be required under the provisions of Section  
303(q) of the Communications Act of 1934, as amended.

None Required

# Section V-B - FM BROADCAST ENGINEERING DATA

## FOR COMMISSION USE ONLY

File No. \_\_\_\_\_

ASB Referral Date \_\_\_\_\_

Referred by \_\_\_\_\_

Name of Applicant

Jerry Snyder and Associates

Call letters (if issued)

KYXS-FM

Is this application being filed in response to a window? ☐ Yes ☒ No

If Yes, specify closing date: \_\_\_\_\_

Purpose of Application: (check appropriate boxes)

☐ Construct a new (main) facility

☐ Construct a new auxiliary facility

☐ Modify existing construction permit for main facility

☐ Modify existing construction permit for auxiliary facility

☒ Modify licensed main facility

☐ Modify licensed auxiliary facility

If purpose is to modify, indicate below the nature of change(s) and specify the file number(s) of the authorizations affected.

☐ Antenna supporting-structure height

☒ Effective radiated power

☒ Antenna height above average terrain

☐ Frequency

☐ Antenna location

☒ Class

☐ Main Studio location

☐ Other (Summarize briefly)

File Number(s) BLH-4843

### 1. Allocation:

Channel No.	Principal community to be served:		
	City	County	State
240	Mineral Wells	Palo Pinto	TX

Class (check only one box below)

☐ A ☐ B1 ☐ B ☒ C3

☐ C2 ☐ C1 ☐ C

### 2. Exact location of antenna.

(a) Specify address, city, county and state. If no address, specify distance and bearing relative to the nearest town or landmark. 300 N.E. 11th Avenue, Mineral Wells, Palo Pinto County, TX

(b) Geographical coordinates (to nearest second). If mounted on element of an AM array, specify coordinates of center of array. Otherwise, specify tower location. Specify South Latitude or East Longitude where applicable; otherwise, North Latitude or West Longitude will be presumed.

Latitude	32	48	42	Longitude	98	06	11
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3. Is the supporting structure the same as that of another station(s) or proposed in another pending application(s)? ☐ Yes ☒ No

If Yes, give call letter(s) or file number(s) or both.

N/A

If proposal involves a change in height of an existing structure, specify existing height above ground level including antenna, all other appurtenances, and lighting, if any.

N/A

Attach as an Exhibit a 75 minute series U.S. Geological Survey topographic quadrangle map that shows clearly, legibly, and accurately, the location of the proposed transmitting antenna. This map must comply with the requirements set forth in Instruction V. The map must further clearly and legibly display the original printed contour lines and data as well as latitude and longitude markings, and must bear a scale of distance in kilometers.

Exhibit No.  
On file

16. Attach as an Exhibit *(name the source)* a map which shows clearly, legibly, and accurately, and with the original printed latitude and longitude markings and a scale of distance in kilometers:

Exhibit No.  
Tech.

(a) the proposed transmitter location, and the radials along which profile graphs have been prepared;

(b) the 316 mV/m and 1 mV/m predicted contours; and

(c) the legal boundaries of the principal community to be served.

17. Specify area in square kilometers (1 sq. mi. = 259 sq. km.) and population (latest census) within the predicted 1 mV/m contour.

Area 4,225 sq. km. Population 51,276

18. For an application involving an auxiliary facility only, attach as an Exhibit a map *(Sectional Aeronautical Chart or equivalent)* that shows clearly, legibly, and accurately, and with latitude and longitude markings and a scale of distance in kilometers:

Exhibit No.  
N/A

(a) the proposed auxiliary 1 mV/m contour; and

(b) the 1 mV/m contour of the licensed main facility for which the applied-for facility will be auxiliary. Also specify the file number of the license.

19. Terrain and coverage data *(to be calculated in accordance with 47 C.F.R. Section 73.313)*

Source of terrain data: *(check only one box below)*

☐ Linearly interpolated 30-second database ☒ 75 minute topographic map (From BLH-4843)

(Source: \_\_\_\_\_)

☐ Other *(briefly summarize)*

### CERTIFICATE OF SERVICE

I, Patricia A. Neil, a secretary in the law firm of Smithwick & Belendiuk, P.C., hereby certify that on this 11th day of March, 1998, copies of the foregoing were mailed first-class, postage pre-paid, to the following:

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Policy and Rules Division  
Mass Media Bureau  
Federal Communications Commission  
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(license of Station KITX)

  
Patricia A. Neil

\*hand delivery